SUPREME COURT, U. S.

NO. ~~1741~~

Supreme Court, U.S.
FILED
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E. ROBERT SEAVER, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1970

70-199

GENE BALL,

Petitioner

v.

BOARD OF TRUSTEES OF THE KERRVILLE INDEPENDENT SCHOOL DISTRICT, HENRY H. WIED, MARGARET WATSON, DAN W. BACON, PAT BRADEN, EARL A. COCHRANE, MAURICE HAUFLER AND C. H. BORCHERS, MEMBERS OF THE BOARD OF TRUSTEES, INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES,

Respondents

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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The petitioner, Gene Ball, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit rendered in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals rendered on December 17, 1970, reported at 434 F2d 1040 and withdrawn on motion for rehearing on May 4, 1971, appears in Appendix A to this petition at page A-1.

The judgment rendered by the United States Court of Appeals on May 4, 1971, without written opinion on May 4, 1971, appears in Appendix A at page A-2.

The Order of the United States District Court dated March 20, 1970, denying temporary injunction appears in Appendix B at page B-1.

The Order of the United States District Court dated May 13, 1970, to show cause appears in Appendix B at page B-2.

The Order of Dismissal entered by the United States District Court on June 5, 1970, appears in Appendix B at page B-5.

JURISDICTION

1. The jurisdiction of this Court is invoked under 28 U.S.C.A. Section 1254(1), which provides:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> "(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

2. The judgment of the United States Court of Appeals for the Fifth Circuit was entered on December 17, 1970. A timely motion for rehearing was denied on May 4, 1971.

QUESTIONS PRESENTED

Gene Ball, petitioner, filed suit under 42 U.S.C.A. Section 1983 in United States District Court seeking damages and injunctive relief. His suit was dismissed from federal district court due to his failure and/or refusal to exhaust the remedies

available to him in State Court in a good faith adversary manner. At the time of filing, an appeal was and is now pending in State District Court, involving the same general subject matter, from an administrative order in favor of Gene Ball. The order of dismissal entered by the Federal District Court has been upheld and sanctioned by the United States Court of Appeals for the Fifth Circuit without written opinion. The sole question thereby arising is:

> Whether exhaustion of State Remedies can be made pre-requisite to a Section 1983 action under the facts here presented.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States, Amendment I:

"Congress shall make no law . . . abridging the freedom of speech . . ."

Constitution of the United States, Amendment XIV, Section 1:

" . . . nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Title 42 U.S.C.A. Section 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF FACTS

In the present posture of this case, procedural issues only are ripe for review. Whether or not Gene Ball, petitioner, is ultimately entitled to any relief is not here in issue. The sole

question is whether he is entitled to his day in court.

The essential facts lack complexity. Gene Ball has taught math at the Tivy High School in Kerrville, Texas, for the six years immediately preceding the 1969-1970 school year. No hint of criticism as to his competency as a math teacher has been raised during these six years nor is it now. His contract for the 1969-1970 school year was terminated on September 3, 1969, for the sole reason that he refused to shave a Van Dyke-style beard which he cultivated during the summer of 1969. This petition for review on writ of certiorari by the Supreme Court of the United States is a link in the chain of endeavor in which Mr. Ball has been engaged since September 3, 1969, to secure re-instatement to his teaching position at the Tivy High School. The following is a synopsis of his efforts in this regard to date:

(during 1969)

1. September 15; open hearing held before the Board of Trustees of the Kerrville Independent School District. This meeting was convened for the express purpose of hearing evidence or points of view relevant to the earlier termination of Mr. Ball's contract on September 3, 1969;
2. September 23 - closed meeting held by the defendant Board members after which they announced that they would not retract their action of September 3, 1969, at which time they had terminated Mr. Ball's 1969-1970 teaching contract;
3. November 19 - hearing of Mr. Ball's appeal from the defendant Board's action of September 3, had before Dr. Edgar, Commissioner of Education of the State of Texas, in Austin, Texas (Dr. Edgar supported the defendant Board by decision rendered December 11);

(during 1970)

4. January 5 - Hearing of Mr. Ball's appeal from the Commissioner's ruling, had before the State Board of Education in Austin. The State Board of Education is the highest administrative body established to govern public education in Texas. The jurisdictional power of the State Board in such matters as Mr. Ball's appeal is limited to correcting abuse of discretion in lower school

authorities and cannot extend to questions of law. Dallas v. Moseley, 286 S.W. 497 (Tex. Civ. App.) Affirmed 17 S.W.2d 36. The State Board overturned the Commissioner's decision by a vote of 8 - 7. The effect of the State Board's decision was to re-instate Gene Ball to his teaching position and to validate his contract for its entire term. Harkness v. Hutcherson, 38 S.W. 1120 (Tex. Supreme Ct. 1897). On January 5, 1970, Mr. Ball's state remedy was adequate. This was at mid-term in the school year. His one-year teaching contract was still in effect. The time when contracts were to be renewed for the next year was then over two months away. Only the passage of time has caused the State remedy to become inadequate;

5. January 15 - At their next regularly scheduled meeting after Gene Ball's position had been vindicated by the State Board, the local Board of Trustees of the Kerrville Independent School District again considered his case. They took no action;
6. February 17 - At their next regularly scheduled meeting, the local Board of Trustees again considered Gene Ball's case. Again they took no action. That Gene Ball's intention was to resolve his difficulty at the administrative level and out of court entirely is evident in the fact that he awaited action from the local Board of Trustees at two of their regularly scheduled meetings after the State Board had held in his favor and only after they filed their State Court appeal did he take his case to court;
7. February 19 - The Kerrville Independent School District filed appeal in the District Court of Kerr County, Texas, from the decision of the State Board of Education;
8. February 27 - Gene Ball filed suit in United States District Court, seeking re-instatement, back pay and damages. The members of the local Board of Trustees are named defendants in their individual and official capacities. Indication of the substantive claims made in his federal suit are as follows:
   (A) His teaching contract was terminated on September 3, 1969, due to his failure to shave a

Van Dyke style beard he had cultivated during the summer. Stated most conservatively, a First Amendment issue can emerge from such a dispute. Ferrell v. Dallas Independent School District, 393 F2d 697 (5th Cir. 1968); Finot v. Pasadena Board of Education, 58 Cal. 520 (1967); Compare, Burnside v. Byers, 363 F2d 744 (5th Cir. 1966) with Blackwell v. Issaquena County Board of Education, 363 F2d 749 (5th Cir. 1966). Some courts have found it unnecessary to reach the First Amendment question, having catagorized the right of an adult, male or female, to present himself or herself physically to the world as he or she chooses to be, a highly protected freedom under the Fourteenth Amendment. Breen v. Kahl, 296 F. Supp. 702 (D.Wis. 1969) Affm. 419 F2d 1034, cert. denied 398 U.S. 937. In Ferrell, the majority opinion written by Judge Gewin assumes hair styles to be entitled to First Amendment protection. The concurring opinion of Judge Godbold and the dissenting opinion of Judge Tuttle (which together constitute a majority of the court) go far beyond the mere assumption of such protection. In later writings of the Fifth Circuit (Brooks v. Auburn University, 412 F2d 1171 (5th Cir. 1969) and of district courts within the Circuit (Perry v. Grenada Mun. Sep. School Dist. 300 F. Supp. 748 (N.D. Miss. 1969), Ferrell, is recognized and treated as a First Amendment decision;

(B) On September 3, 1969 Mr. Ball's teaching contract was terminated by defendants at a specially called meeting held on, at the most, 3½ hours notice to him and in his absence. Perhaps the requirement of Texas Law (Art. 6252 V.A.C.S.) that such meetings be held on no less than three day notice can furnish guidance here. If this three day requirement falls short of constitutional gravity, nevertheless 3½ hours notice is too short to meet constitutional muster where everything is at stake as here. See: 81 Harv. L.R. at 1452. In this

instance, this violation of procedural due-process guaranteed by the Fourteenth Amendment is compounded by the fact that no rule exists in the Kerrville Independent School District that teachers not wear beards. See: Lucia v. Duggan, 303 F. Supp. 112 (D.C. Mass 1969) See Also: Lucas v. Chapman, 430 F2d 945 (5th Cir. 1970);

(C) Under the equal protection clause of the Fourteenth Amendment it makes no difference that the threatened interest is a privilege rather than a right. Even a privilege cannot be granted to some but withheld from others where the basis of classification is arbitrary. See: 81 Harv. L.R. 1439 at 1454 et seq. Mr. Ball was directed to shave his beard to make it easier to enforce the policy that students be clean shaven. The administration concedes that two members of the faculty were then wearing mustaches although students are forbidden mustaches as well as beards;

(D) That lack of tenure is no defense to an allegation that a renewal contract was denied a teacher because he sought to exercise his rights under the First and Fourteenth Amendments of the Constitution is well established within the Fifth Circuit. Pred v. Board of Public Instruction, 415 F2d 851 (1969); Ferguson v. Thomas, 430 F2d 852 (5th Cir. 1970); Lucas v. Chapman, 430 F2d 945 (5th Cir. 1970); Johnson v. Branch, 364 F2d 177 (4th Cir. 1966); Greene v. Howard University, 412 F2d 1128 (D.C. Cir. 1969); Jones v. Hopper, 410 F2d 1323 (10th Cir. 1969).

The above is intended only as brief indication of substantive issues raised by the pleadings. The only purpose here is to show such claims to be both federal and substantial in nature;

9. March 20, 1970 - Hearing had in United States District Court on Mr. Ball's motion for temporary injunction. Motion denied. The Court further ordered that a hearing on the merits would be set immediately upon completion of what were characterized by the court as

administrative proceedings pending in State Court;

10. April 2, 1970 - Plaintiff filed Second Amended Answer in the State Court appeal then and now pending in the Second 38th District Court of Kerr County, Texas, in effect, inviting the State Court to hold adversely to him on the asserted ground that he had neither the financial resources nor the time to engage in appellate action in the State Court which would probably follow were he successful at the trial level (Mr. Ball had reserved his federal issues for later determination by the federal court under the doctrine of England v. Louisiana State Board of Med. Exam., 375 U.S. 411 (1964) therefore effectively removing the issue of reinstatement for next fall from the scope of the State proceeding);
11. May 13, 1970 - Show Cause Order entered by United States District Court requiring Mr. Ball to show cause why his federal case should not be dismissed in the event that he either failed or refused to contest the State Court proceeding in good faith effort to win it. The order stated that "England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964), recognized that a party may retain his right to pursue his federal claims in Federal Court by the simple expedient of informing the State Court 'that he intends, should the State Court hold against him on the question of state law, to return to the District Court for disposition of his federal contention";
12. June 5, 1970 - Order of Dismissal entered by the United States District Court due to Gene Ball's failure and/or refusal to exhaust the administrative remedies available to him in State Court.

In view of the original opinion rendered on December 17, 1970 by the Court of Appeals it seems in order to clearly delineate here that the dismissal from district court was solely on procedural grounds. Gene Ball's case was not dismissed from federal district court for failure to state a cause of action, or on summary judgment, or for any reason which reflects on the merit of his federal claims. While neither then nor now presented as findings of the court, two expressions from the bench are

indicative that the district court did not regard Gene Ball's federal claims to lack substance on their merits. On page 169 of the record from the hearing on application for temporary injuction, the court observed:

> "*Now, if this had happened about the time the school year began, I don't think I would have been hesitant in granting a temporary injunction on the state of the record as it is now, but what I am concerned about is the fact that we are toward the end of the school year."

*emphasis supplied

and on page 172 is found the following statement of the court:

> "*I think that he has raised a serious constitutional issue in this case, a very serious issue, and I certainly do not want to do anything to deprive him of the right to litigate it in this court if he feels that at some time he has not had full opportunity to do so in the state court, *but I do not think that in the meantime that I should interfere with the processes that are now in motion in the state court."

*emphasis supplied

The above are, at most, offhand expressions by the Court and based on a record not then or now fully developed on its merits. They are quoted here solely because so clearly indicative that Gene Ball's federal claims were not regarded as unsubstantial by the district court after the record had developed to its present posture. Whether or not Gene Ball had any federally protected substantive right which had been violated is simply a question not ripe for review. The issues presented for review involve remedies rather than rights. They are procedural rather than substantive. As reflected in the language quoted from the bench as well as from the orders of the District Court issued March 23, 1970 (denying temporary injuction); May 13, 1970 (show cause); and June 5, 1970 (dismissal), it is clear

that the substantive merit (or lack of it) of Mr. Ball's federal claims had no part in the dismissal of his suit from federal court;

13. December 17, 1970 - Gene Ball's appeal to the Court of Appeals for the Fifth Circuit was denied. Speaking per curium, the court expressed its reasoning as follows:

> "The Appellant, Gene Ball, has not demonstrated that he has any federally protected right which has been violated; and

(in 1971)

14. May 4, 1971 - On petition for rehearing, the Court of Appeals withdrew its original opinion and substituted the following:

> "Judgment Affirmed. See Local Rule 21."

Gene Ball's petition for rehearing en banc was also denied, the Court having been polled at the request of one of its members and the majority of the Circuit Judges in active service not having voted in favor of it.

REASONS FOR GRANTING THE WRIT

1. The order of dismissal entered by the District Court and sanctioned by the Court of Appeals directly conflicts with this Court's rulings in Monroe v. Pape, 365 U.S. 167 (1961); McNeese v. Board of Education, 373 U.S. 668 (1963); Damico v. California, 389 U.S. 416 (1967); and with the recent holdings of the Fifth Circuit in Moreno v. Henckel, 431 F2d 1299 (5th Cir. 1970) and Rainey v. Jackson State College, 435 F2d 1031 (5th Cir. 1970).

Where the facts pleaded, as in Gene Ball's complaint filed in United States District Court, are adequate to bring the case under Title 42, U.S.C.A. Section 1983 jurisdiction, exercise of such jurisdiction cannot be predicated on exhaustion of state remedies. In reversing a three-judge court in Damico v. California, 389 U.S. 416 (1967), this Court treated the question as one governed by settled law:

> ". . . The three-judge District Court dismissed the complaint solely because 'it appear[ed] to the Court

> that all of the plaintiffs [had] failed to exhaust adequate administrative remedies.' This was error. In McNeese v. Board of Education, 373 U.S. 668, noting that one of the purposes underlying the Civil Rights Act was 'to provide a remedy in the federal courts supplementary to any the state might have,' id., at 672, 10 L ed 2d at 625, we held that 'relief under the Civil Rights Act may not be defeated because relief was not first sought under state law which provided [an administrative] remedy,' id., at 671, 10 L. ed 2d at 625. See Monroe v. Pape, 365 U.S. 167, 180-183."

The principle that when federal jurisdiction is invoked under 42 U.S.C.A. Section 1983, the federal remedy is supplemental to any that the state might offer, first enunciated in Monroe v. Pape, 365 U.S. 167 (1961) and fortified in McNeese v. Board of Education, 373 U.S. 668 (1963) is now axiomatic in law and does not warrant further discussion. The Fifth Circuit is in accord. See; Moreno v. Henckel, 431 F2d 1299 (5th Cir. 1970); Rainey v. Jackson State College, 435 F2d 1031 (1970).

Gene Ball originally misunderstood the import of the District Court's ruling of March 21, 1970. He understood this ruling to have been grounded on principles of comity – that the federal court to preserve the delicate balance which exists between state and federal courts would stay its hand during the pendency of the state suit. Only upon receipt of the Show Cause Order of May 13, 1970, did Gene Ball understand that it was exhaustion of state remedies which was required of him. This is borne out by the order of dismissal entered by the District Court on June 5, 1970, which is based on his "failure and/or refusal to exhaust the administrative remedies available to him in State Court, in a faithful and effective manner."

2. Even assuming exhaustion could be required, there is here no adequate state remedy.

Mr. Ball's 1969-1970 teaching contract is for one year only. In accordance with Art. 2781, V.A.C.S., the predecessor to Section 23.28 of the Texas Education Code, it commenced July 1, 1969, and terminated June 30, 1970. The Kerrville Independent School District has not adopted the provisions of

the probationary or continuing contract law as set out in Section 21.201, et seq., of the Texas Education Code. As under its predecessor, Art. 2891-50, V.A.C.S., the said Section 21.201 is discretionary, in that a school board is given the choice of coming under the Act. by adopting the tenure plan set out in said Act, or continuing to contract under prior laws. Op. Atty. Gen. 1967, No. M-123; see also: Section 23.28 (e), Tex. Ed. Code. Thus Mr. Ball is without shelter in the form of tenure. It is of no consequence that the public policy of the state would have permitted a contract for a longer term (up to three years in Districts where the scholastic population is less than 5,000, as here - Art. 2781, V.A.C.S. and Sec. 23.28 of Tex. Ed. Code). The fact is that his contract was for one year only and that the year with which it was concerned is now history.

Remedies under Texas law available to a discharged teacher in Mr. Ball's situation all begin and end with whatever rights he may have under his contract. Where, as here, the State Board has determined that a teacher has been improperly discharged, the decision has the effect of re-instating the teacher and of making his contract good from the beginning. Harkness v. Hutcherson, 38 S.W. 1120 (Tex. 1897); Brazoria Ind. School Dist. v. Weems, 295 S.W. 268 (Tex. Civ. App. 1927); Gragg v. Hill, 58 S.W. 2d 150 (Tex. Civ. App. 1933); 51 Tex. Jur. 2nd at 562. Harkness involved only claims for damages to be measured by unpaid salary under teaching contracts. In Brazoria, a two-year contract of a school prinicpal was an issue. Back pay was ordered and the principal re-instated for the unexpired term of her contract. Ramos v. Guerra, 311 S.W. 2d 869 (Tex. Civ. App. 1953) is the only Texas case found by petitioner where only injunctive relief was sought by a discharged teacher. Injunctive relief, limited to the teacher's contract year, was therein granted. The important thread running in common through each holding cited above is that, even where successful as to injunctive relief sought as well as monetary damages, relief is limited in terms of time as well as dollars to rights acquired under the teaching contract.

Time has run out under Mr. Ball's contract. No higher authority need be cited for the declaration that school authorities have limited discretion in Texas in the matter of teacher dismissal than the action of the State Board with

respect to Mr. Ball. But this limited discretion is only with reference to teachers who are already under contract. No limitation, whatsoever, is imposed upon local Boards of Trustees in the matter of renewal of teaching contracts. Perhaps this is in recognition of generally accepted principles of freedom of contract. Perhaps it reflects recognition of public policy to give school officials as free a hand as possible. As stated in Underwood v. Sabinal Independent School Dist. 275 S.W. 267 (Tex. Civ. App. 1925);

> "The Legislature has sought to place the public free system in a position of freedom from interference by the courts so far as practical. Donna Independent School Dist. v. Bank (Tex. Civ. App.) 227 S.W. 974; South San Antonio School Dist. v. Martine (Tex. Civ. App.)

Whatever the reason, the affect is to deny Mr. Ball even an arguable basis under Texas law upon which he could support a claim to re-instatement to his teaching position next year.

It perhaps cannot be emphasized too strongly that Gene Ball does not claim a vested right in his Federal Sec. 1983 action to be employed by the State of Texas (as personified by the Kerrville Independent School District). Rather he asserts that an opportunity of employment by the State is being denied him because he sought to exercise rights guaranteed under the First and Fourteenth Amendments.

Re-instatement is the heart of the controversy. In addition to re-instatement and back pay, however, Mr. Ball also seeks damages from defendants. Under general principles of immunity of government officials while acting in a governmental capacity, Mr. Ball is denied a remedy under Texas Law to recover such damages. Campbell v. Jones, 264 S.W. 2d 425 (Tex.).

It is, therefore, submitted that no state remedy, either adequate or otherwise, is provided by the State of Texas which could even arguably support Mr. Ball's asserted right to re-instatement next year or his damage claims (except back pay for his 1969-1970 teaching year) against the defendants.

3. Abstention is neither involved nor would it be appropriate.

The District Court's order of dismissal, as allowed to stand by the Fifth Circuit, is based on failure to exhaust state remedies. Abstention is not here involved. Language in Wisconsin v. Constantineau, 91 U.S. Supreme Ct. 507 (January 19, 1971) with reference to abstention – "the fact that Wisconsin does not raise the point does not mean that it lacks merit" – would seem to give cause, however, to negate the applicability of the doctrine to Gene Ball's case. In Wisconsin this Court stated:

> "'. . . But the abstention rule only applies where the issue of state law is uncertain.' Harman v. Forsenius, 380 U.S. 528, 534. Thus our abstention cases have dealt with unresolved questions of state law which only a state tribunal could authoritatively construe. Reetz v. Bozanich, supra; Meridian v. Southern Bell Tel. & Tel. Co., 358 U.S. 639."

No unsettled question of state law here exists, the determination of which could avoid or modify the constitutional question (Zwiekler v. Koota, 389 U.S. 241); no attack is here made on the constitutionality of a state statute where state court construction thereof could render constitutional decision unnecessary (Reetz v Bozanich, 397 U.S. 82); no state court is here performing in a legislative capacity (Burford v. Sun Oil Co., 319 U.S. 315). The questions in Gene Ball's Section 1983 federal action are all federal questions based on the First and Fourteenth Amendments to the Constitution of the United States.

In County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, (1959) this Court specifically held abstention not applicable nor hazard of unsettling some delicate balance in the area of federal-state relationships to exist merely because state and federal suits involving the same subject matter were proceeding side by side and judgment in the federal suit would render the state proceeding moot.

4. En personam actions involving the same subject matter can proceed side by side in Federal Court and in State Court until one goes to judgment.

Kline v. Burke Construction Co., 260 U.S. 226, settled the

governing principle. In that case federal diversity jurisdiction had been invoked to adjudicate an alleged breach of contract. The defendant in the federal court proceeding had initiated a suit in a state court to adjudicate the same issue. The Court of Appeals ruled that the Federal District Court should have issued a requested injunction to stay the state court proceedings. This Court held that a statute similar to present Section 2288 barred the injunction, but that the District Court could adjudicate the breach of contract issue even though its holding would be decisive of the state case.

That the State Court appeal now pending in Kerr County, Texas, is judicial rather than administrative in character is apparent from comparison of Prentis v. Atlantic Coast Line Co. 211 U.S. 210 (1908) with Railroad and Warehouse Commission v. Duluth Street R. Co., 273 U.S. 625 (1927). Both opinions were written by Mr. Justice Holmes. In both cases railroads had initiated state administrative procedures, but had balked at following the state appellate process into state court. The railroads elected in both cases to file suit in federal court instead.

In Prentiss the railroad was required to first complete the State Court appellate process. In Duluth, the railroad was permitted to pursue its constitutional claim in federal court. The single, but vital, distinction found by Mr. Justice Holmes to exist between the two cases was that in Prentiss the state court was performing in a legislative capacity, but in Duluth the state court was performing judicially. Mr. Justice Holmes reasoned that legislation looks to the future and, therefore, cannot become res-judicata. A judicial inquiry, on the other hand, investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. As the state court in Duluth was performing in a judicial capacity, this Court held that even the possibility of res-judicata was sufficient reason to allow the federal suit to proceed.

Under this test the inquiry in the State Court suit is clearly judicial. It follows that Kline v. Burke, supra, would govern, even if the issue here were simply whether federal and state lawsuits were to be allowed to proceed side-by-side, rather than whether exhaustion of remedies in State Court can be made predicate to exercise of federal jurisdiction under Section 1983.

5. England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964) cannot afford Gene Ball a second opportunity to litigate his federal claims.

In its order to show cause entered May 13, 1970, the federal District Court recognized that England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964) afforded Gene Ball a method of reserving his federal claims from the scope of the state proceeding thereby avoiding the harsh consequences of res-judicata. But only Gene Ball's federal claims can support his asserted right to re-instatement or his damage claims other than for back pay for the 1969-1970 school year. His theoretical right to reserve these claims from the state proceeding does not, in effect, afford him two bites at the apple, as does, for example, the habeas corpus exhaustion requirement, 28 U.S.C.A., Section 2254. In the State Court appeal filed by the Kerrville Independent School District there is simply no state statute to be construed "in light of" Gene Ball's federal claims. The only possible way he can put his claim to re-instatement or damages other than back pay for the one year before the State Court would be by election to litigate them fully there. Such election would clearly constitute a bar rather than a condition to subsequent litigation of such federal issues in federal court. In the introductory paragraph to Brown v. Chastain, 416 F2d 1012 (5th Cir. 1969), the court stated:

> "We are here presented with the question whether the District Court had jurisdiction to directly review a *final determination of federal constitutional questions voluntarily submitted to and decided by the state courts of Florida in connection with litigation pending in the state courts, no review by the United States Supreme Court having been sought. *The District Court had no jurisdiction and we reverse."
> *emphasis supplied.

6. Gene Ball has not waived his right to pursue his federal claims in Federal Court nor is he estopped from proceeding in Federal Court due to the fact that he first availed himself of opportunities of administrative review made available under

Texas law.

Estoppel and waiver are principles of the law of contracts. The following is what Mr Justice Holmes had to say in response to a similar assertion of such a contract in Railroad and Warehouse Commission v. Duluth St. R. Co., supra,:

> "The argument that plaintiff is barred by a contract needs but a word. Assume for purposes of decision that the plaintiff by coming in under the State Law made a contract and as part of it adopted the statutory method of getting its rates changed. But it would be extravagant to say that it did more than adopt that method in its general character and with its ordinary incidents. If apart from the supposed contract a party would have been entitled to go to the Court of the United States at the stage when the plaintiff went there – no reasonable interpretation of the contract forbade the plaintiff to go and there is no need to consider whether the contract could have forbidden it if it tried."

See also: Thompson v. Gibbs, 60 F. Supp. 872 (E.D.S. Car. 1945) and cases cited therein.

Gene Ball did not initiate the proceeding now pending in State District Court (Appeal by School District from adverse ruling by State Board of Education). His only part in making it possible was having obtained a favorable ruling before the State Board of Education. His entire participation in the State Court proceeding is directed toward escaping with the least possible prejudice to his right to litigate his federal claims in federal court (by reservation of such claims from the scope of the State proceeding).

In England v. Louisiana State Board of Medical Examiners, supra, the petitioner had initiated action in federal district court and had been relegated to the state court by application of the abstention doctrine. Gene Ball, on the other hand, has presented his case to every administrative body created by the

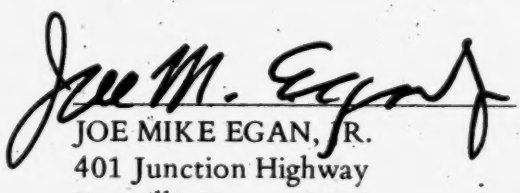
State to hear such matters, but draws the line at presenting his claims to the State Court.

Very different from the above were the procedural happenings in Sweetbriar Institute v. Button, 280 F. Supp. 312 (N.D. Va. 1967), reversed by this Court, 387 U.S. 423. In Sweetbriar, the petitioner had taken the two extra steps which Gene Ball would carefully avoid. He had (1) of his own volition and prior to the filing of his federal suit, filed his case in State Court and (2) had presented his federal claims to the state court where they had been fully litigated. Only after his federal claims had been litigated in the State Court and only a formal decree remained to be entered, did the petitioner there amend his State complaint, asking the State Court to dispose of the question of State law in light of his federal contentions and reserving his right to return to the federal court for disposition of his federal claims. The district court, after finding dismissal warranted under the teachings of England, abstained, in lieu of dismissing the case, expressly to avoid possibility of injury to the petitioner. This Court, in summarily reversing the district court's abstention order and ordering that the case be re-instated for hearing cited England and Kline v. Burke Construction Co., supra.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Fifth Circuit rendered in this case.

Respectfully submitted,



JOE MIKE EGAN, JR.
401 Junction Highway
Kerrville, Texas 78028
Counsel for petitioner

CERTIFICATE OF SERVICE

I certify that before mailing the foregoing instrument, petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit, for filing that I personally delivered to the office of LAVERN D. HARRIS, Realty and Trust Building, Kerrville, Texas 78028, sole counsel for all respondents, three copies thereof in accordance with Rule 33 of the Rules of the Supreme Court.

Joe M. Egan

JOE MIKE EGAN, JR.

APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 30063

GENE BALL,

Plaintiff-Appellant,

versus

BOARD OF TRUSTEES OF KERRVILLE INDEPENDENT SCHOOL DISTRICT, ET AL,

Defendants-Appellees.

Appeal from the United States District Court for the Western District of Texas

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(December 17, 1970)

Before JONES, GEWIN and CLARK, Circuit Judges.

PER CURIAM: The Appellant, Gene Ball, has not demonstrated that he has any Federally protected right which has been violated. The judgment of the district court is

AFFIRMED.

APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 30063

GENE BALL,

Plaintiff-Appellant,

versus

BOARD OF TRUSTEES OF KIERRVILLE INDEPENDENT SCHOOL DISTRICT, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Western District of Texas

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(May 4, 1971)

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

Before JONES, GEWIN and CLARK, Circuit Judges.

PER CURIAM: The opinion originally issued in this case is hereby withdrawn and the following opinion is substituted therefor:

Judgment AFFIRMED. See Local Rule 21.[1]

The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is also DENIED.

[1]See NLRB v Amalgamated Clothing Workers of America, 430 F2d 966 (5th Cir. 1970).

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

GENE BALL	X	
	X	
V.	X	CIVIL ACTION
BOARD OF TRUSTEES OF THE	X	SA 70CA88
KERRVILLE INDEPENDENT SCHOOL	X	
DISTRICT, ET AL	X	

ORDER DENYING TEMPORARY INJUNCTION

On the 20th day of March, 1970, came on for consideration the plaintiff's motion for temporary injunction; and the Court having fully considered the pleadings, the evidence, the briefs and the arguments of counsel, is of the opinion that the motion for temporary injunction should be and the same is hereby DENIED.

It is further ordered that a hearing on the merits herein will be set immediately after the completion of the administrative proceedings now pending in the Second 38th District Court of Kerr County, Texas.

Entered this 23rd day of March, 1970.

s/Adrian A. Spears

Adrian A. Spears
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

GENE BALL	X	
	X	
V.	X	CIVIL ACTION
	X	NO. SA70CA88
BOARD OF TRUSTEES OF THE	X	
KERRVILLE INDEPENDENT SCHOOL	X	
DISTRICT, HENRY H. WIED	X	
MARGARET WATSON, DAN W. BACON,	X	
MAURICE HAUFLER, EARL A.	X	
COCHRANE, PAT BRADEN and	X	
C. H. BORCHERS, members of	X	
THE BOARD OF TRUSTEES, indi-	X	
vidually and in their official	X	
capacities	X	

ORDER TO SHOW CAUSE

On this the 13th day of May 1970, it appearing that on March 23, 1970 this Court denied plaintiff's motion for temporary injunction and ordered "that a hearing on the merits herein will be set immediately after the completion of the administrative proceedings now pending in the Second 38th District Court of Kerr County, Texas"; and

It further appearing that on May 1, 1970 plaintiff filed his "First Amended Complaint", accompanied by his "Sixth Brief", to which was attached a copy of a "Second Amended Answer" filed by plaintiff as appellee in Cause No. 6405, in said Second 38th District Court of Kerr County, Texas, in which Second Amended Answer plaintiff seeks to withdraw his pleas in abatement and/or motions to dismiss number one and two, and invites the State Court to dispose of the pending litigation adversely to him; and

It further appearing that the course being pursued by plaintiff in the State Court is contrary to the spirit, if not the letter, of this Court's order of March 23, 1970, which contemplated a good faith attempt on plaintiff's part to complete the proceedings in the State Court in an adversary manner; and

It further appearing that in and by said order of March 23, 1970 this Court acknowledged its intention to hold a hearing on the merits of this cause in order to consider any federal claims remaining after completion of the administrative proceedings in the State Court; and

It futher appearing that the Supreme Court of the United States, in England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964), recognized that a party may retain his right to pursue his federal claims in Federal Court by the simple expedient of informing the State Court "that he intends, should the State Courts hold against him on the question of state law, to return to the District Court for disposition of his federal contention"; and

It further appearing that proper court administration, and the preservation of the delicate balance between the State and Federal Courts, demand that the lawsuit now pending in the Second 38th District Court of Kerr County, Texas, be completed as a good faith adversary proceeding; it is, therefore,

ORDERED that not later than Wednesday, May 20, 1970, the plaintiff shall show cause in writing, with a copy to opposing counsel, why, in the event he either fails or refuses to contest the cause pending in the State Court in a good faith effort to win it, this cause should not be dismissed for failure and/or refusal to exhaust the administrative remedies available to him in State Court, in a faithful and effective manner.

Within five (5) days thereafter, defendants are directed to reply thereto in writing, with a copy to opposing counsel.

Entered this 13th day of May 1970.

s/Adrian A. Spears
Adrian A. Spears
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

GENE BALL	X
	X
V.	X
	X
BOARD OF TRUSTEES OF	X
KERRVILLE INDEPENDENT	X
SCHOOL DISTRICT, et al	X

ORDER OF DISMISSAL

On this the 5th day of June, 1970, came on to be considered the Court's order entered herein on May 13, 1970, requiring plaintiff to show cause in writing why, in the event he either fails or refuses to contest the cause pending in the State Court in good faith effort to exhaust the administrative remedies available to him in State Court, in a faithful and effective manner. Having considered said order, together with the responses and briefs by the parties herein, along with plaintiff's representation of his intention not to exhaust said administrative remedies, this Court is of the opinion that plaintiff has failed to show cause why this case should not be dismissed. It is, therefore,

ORDERED, ADJUDGED and DECREED that this cause be and it is hereby dismissed, without prejudice, however, to plaintiff's right to petition the court for reinstatement of this cause for the purpose of considering any federal claims remaining after completion of the administrative proceedings pending in the State Court; provided such administrative proceedings are completed by plaintiff in a good faith adversary manner.

SO ORDERED this 5th day of June, 1970 at San Antonio, Texas.

s/Adrian A. Spears

Adrian A. Spears
United States District Judge